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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAVALE SHAWN VEAN,

Defendant and Appellant.

F057639

(Super. Ct. No. MCR027158A)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Jennifer R.S. Detjen, Judge.

Hilda Scheib, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Rachelle A. Newcomb, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Lavale Shawn Vean was charged with and convicted of count I, possession of cocaine base for sale (Health & Saf. Code, § 11351.5), and count II, misdemeanor resisting arrest (Pen. Code[1], § 148, subd. (a)(1)), and the jury found true the special allegations that he had one prior strike conviction (§ 667, subds. (b)-(i)); served one prior prison term (§ 667.5, subd. (b)); and had two prior narcotics-related convictions (Health & Saf. Code, § 11370.2, subd. (a)). He was sentenced to the second strike term of 17 years.

On appeal, defendant contends the court abused its discretion when it permitted the prosecution to introduce a videotape of an incident in 2001, when defendant sold cocaine to an undercover officer. Defendant contends the videotape should have been excluded because the prosecution failed to timely disclose its existence, and the videotape was prejudicial and cumulative to other admissible evidence of defendant's prior sale of cocaine. Defendant also contends the court imposed unauthorized fines. We will strike one fine and otherwise affirm.

FACTS

On November 30, 2006, several officers from the Madera County Narcotics Enforcement Team (MADNET) executed a search warrant at a rented house and encountered defendant and 11 other people. Defendant and four occupants were in a bedroom. The officers placed defendant and the others in handcuffs for safety purposes, conducted quick patdown searches for weapons, directed them into the living room, and determined their identities. Neither defendant nor any of the other occupants were under the influence of narcotics, and defendant did not display symptoms of long-term use of cocaine base, such as burned fingers, missing teeth, or dark eye circles.

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

Madera Police Officer Brian Esteves checked defendant's name through dispatch and learned he was on parole, and defendant confirmed that fact. Esteves escorted defendant back into the same bedroom to get away from the large group of detained subjects, and advised defendant that he was going to be thoroughly searched pursuant to his parole search conditions. Defendant was in handcuffs with his arms behind his back, and he was cooperative as Esteves searched his pants pockets and outer clothing. Esteves did not find any contraband.

Esteves directed defendant to turn around so he could check defendant's rear waistband and pants. Defendant's demeanor changed, and he backed up and said, "You are not searching me anymore. We are done." Esteves advised defendant that he was subject to a parole search condition, but defendant still refused to comply. Defendant pulled away from Esteves and put both of his restrained hands inside the back of his waistband. Esteves thought defendant was trying to hide something. Esteves grabbed defendant's arm, threw him on the bed, and tried to gain control of defendant's hands. Defendant resisted and Esteves called for help. Parole Agent Todd Cregar, another MADNET officer, went into the bedroom and helped Esteves regain control of defendant.

Esteves "pried away" defendant's arms from his pants, lifted up defendant's waistband, looked down his pants, and saw a plastic bag that was tied in a knot. Esteves and Cregar made defendant stand up, Esteves shook defendant's pants, and a clear plastic bag fell out of defendant's left pants leg and landed on the floor.

The plastic bag contained 15 large rocks of cocaine base, along with smaller broken pieces, with a net weight of 3.79 grams. Esteves testified the rocks were in various sizes, they could be sold for $20 to $30 each, and the total value was "well over" $320 to $340. Defendant also had $121 in one of his pockets.

The bedroom where defendant was searched also contained two cell phones on the bed, and a single .38-caliber bullet on top of a videogame on the television set. The officers could not connect the cell phones to defendant or any of the subjects found in the

house. The search of a second bedroom revealed a .38-caliber semiautomatic handgun, a magazine with ammunition that matched the gun, a box of 100 rounds of Remington .38-caliber ammunition, a digital scale, and Ziploc baggies. The officers did not find additional narcotics or any narcotics paraphernalia in the house, the trash, or in the possession of the other occupants.

Esteves testified that, in his opinion, the house was set up for narcotics sales because none of the occupants were under the influence, and the gun and ammunition would have been used to protect the narcotics and cash. Esteves testified that homes which are occupied by drugs users lack furniture except for sleeping bags or blankets, and weapons are not usually present unless there are also large amounts of drugs and/or cash. In contrast, the rented house in this case was fully furnished and appeared to be occupied, and a weapon and ammunition were present. Esteves testified he had previously arrested another subject in the house for the sale of cocaine base.

Esteves also testified that, in his opinion, defendant possessed the cocaine base for purposes of sale. Esteves' opinion was based on defendant's presence in such a house, the large amount of drugs and cash in his possession, and the location in which the drugs were hidden on his body. He was not under the influence and did not show any signs of long-term drug use. Esteves testified a normal dosage of rock cocaine is 0.1 gram, which would get a person high for 30 to 90 minutes. Esteves testified that $20 was a common purchase amount for 0.2 grams to 0.4 grams, defendant had "well over an amount that a user would have on their person," and Esteves never encountered anyone who had used 3.79 grams of rock cocaine in one day. An analyst for the Department of Justice testified that cocaine base was typically smoked, the normal usable amount was 0.02 grams, and 3.79 grams was "many times over" a usable amount.

Evidence of defendant's prior sale of cocaine base

As we will discuss, the trial court admitted evidence of defendant's prior sale of cocaine to an undercover officer and his subsequent conviction for that act, and found the

evidence was relevant to establish defendant's knowledge of the narcotic nature of the rocks inside the plastic bag and that he possessed the cocaine in this case with the intent to sell, pursuant to Evidence Code section 1101, subdivision (b).[2]

Officer Staci LaFontaine testified that during August 2001, she led a MADNET undercover investigation into a large-scale operation where men were openly selling rock cocaine in Madera's McNally Park area. As part of that investigation, Officer Tony Serrano drove into the park on August 8, 2001, in an unmarked van. He was given $40 to $50 and instructed to purchase drugs in the park. Serrano was wired with a microphone, and a video camera was hidden in the van and aimed through a small hole in the passenger side. Serrano made two trips into the park that day, and defendant sold cocaine to him during one of the trips. Both trips were recorded on videotape. The videotape was played for the jury in this case, and Serrano and LaFontaine narrated the videotape for the jury.[3]

Serrano testified that when he first drove into the park, defendant and three other individuals ran up to the passenger side of the van, crammed their heads into the open window, and offered to sell narcotics to him. Serrano spoke in Spanish and asked for a "20" of "roca," which meant $20 worth of rock cocaine. Defendant removed something from his mouth which appeared to be narcotics. The other three people did the same thing. Serrano bought drugs from one of them, but he did not buy from defendant at that time.

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[2] Evidence that a defendant has committed crimes other than those currently charged is not admissible to show bad character or predisposition to criminality, but it may be admitted to prove some material fact at issue, such as motive, opportunity, intent, preparation, common plan or scheme, knowledge, identity, and/or absence of mistake or accident. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*); *People v. Gray* (2005) 37 Cal.4th 168, 202 (*Gray*).)

[3] As we will discuss in issues I and II, *post*, defendant contends the court improperly admitted the videotape because the prosecution did not timely disclose the videotape's existence and the evidence was cumulative and prejudicial.

Later that same day, Serrano returned to the park in the van. Defendant and another person ran to the van, defendant reached the passenger-side window first, and he produced drugs from his pocket. Serrano bought 0.33 grams of cocaine base from defendant. It was stipulated that defendant was convicted of selling cocaine as a result of the undercover operation.

Defense evidence

Curtis Price, defendant's half brother, who had a prior conviction for misdemeanor assault, testified he was at the rented house when the MADNET officers arrived with the search warrant. Price was playing a video game with defendant and several other people in the bedroom when the officers arrived. Price testified he saw a white substance in a plastic bag on the bedroom floor as the officers escorted defendant and the others out of the room.

Price claimed he argued with the officers about the validity of the search warrant, demanded his immediate release, and the officers unlocked his handcuffs. Price also claimed he followed Esteves and defendant into the bedroom, Esteves threw defendant on the bed and said defendant did not have any rights because he was on parole, and defendant did not resist. Price testified he never saw anything fall out of defendant's pants.[4]

Ronnie Lewis, an admitted chronic user of crack cocaine, testified that an average addict could use 3.79 grams of rock cocaine in one day, but a chronic user would ingest that much in three to five hours. Lewis knew defendant from the streets, and he learned about defendant's case because he read the courthouse docket and offered to testify for defendant. Lewis had prior convictions for transportation/sales of PCP, forgery, and petty thefts with prior convictions.

[4] Officer Esteves testified Price was detained and placed in handcuffs, he remained in the living room when Esteves searched defendant in the bedroom, Price was never released from handcuffs, and he was never allowed to walk around the house.

DISCUSSION

I. Discovery of the videotape

As discussed *ante*, the court permitted the prosecution to introduce evidence that defendant sold cocaine to an undercover officer in 2001, and that he was convicted for that act, as relevant to show his intent and knowledge in this case pursuant to Evidence Code section 1101, subdivision (b). The court also permitted the prosecution to play the videotape from that undercover operation, which depicted defendant running to Officer Serrano's undercover vehicle and selling cocaine to him. The court admitted the videotape even though the prosecutor did not know, or advise the court and defendant, about the videotape's existence until just before Serrano's scheduled trial testimony.

Defendant contends the court improperly admitted the videotape because the prosecution did not timely disclose the videotape's existence, and the belated discovery of the videotape in the midst of trial violated the reciprocal discovery statute (§ 1054.1) and *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). Defendant argues the court should have either excluded the videotape, or granted defendant's request for a continuance so he could closely examine the audio portion of the tape and prepare for his cross-examination of Serrano.

We will review the circumstances in which the prosecution sought to introduce the videotape, and then address defendant's discovery contentions.

A. Background

On the first day of trial, the court granted the prosecution's motion to introduce evidence about defendant's sale of cocaine base to Officer Serrano during the August 2001 undercover operation and defendant's subsequent conviction of the sale of cocaine base as a result of that incident. The prosecutor said he would introduce evidence about the undercover operation through the testimony of Serrano and LaFontaine. The prosecutor did not mention anything about the existence of a videotape of the undercover operation.

On the second day of the prosecution's case-in-chief, the prosecutor advised the court that he was about to call Officer Serrano to testify about defendant's sale of drugs to him during the 2001 undercover operation. The prosecutor also advised the court that, although he knew the undercover operation had been videotaped, he previously believed the videotape no longer existed. However, Serrano had just informed him that Serrano had a copy of the videotape which depicted defendant selling cocaine to him. The prosecutor asked to introduce Serrano's copy of the videotape of the undercover sale, and explained: "I understand it's late and I would never withhold something like that intentionally from [defense counsel]." The prosecutor said he contacted defense counsel that morning and invited him to watch the videotape, but defense counsel said he was busy and declined the offer.

The court directed the prosecutor to play the videotape for the court and defense counsel. After the court and the parties watched the videotape, defense counsel objected to the admission of the videotape because the prosecutor failed to timely disclose the existence of the tape pursuant to the standing reciprocal discovery orders. Defense counsel argued the videotape had been "in the prosecution's possession. Maybe not the District Attorney's Office, but it was in one of the arms of the prosecution and one of the officers and it was not provided in a timely fashion. This case has been going on for two years almost and now it's being brought forward. I was provided reports, but not the video." Defense counsel added: "The prosecution has a real duty to scour their records and their investigators to get that information and provide it to the defense so we know what we are facing rather than mid trial we are given a tape."

The prosecutor acknowledged his duty to check his records for evidence and apologized for the untimely discovery of the videotape. The prosecutor explained that he became involved in the case the prior week, and his first meaningful conversation with Officer Serrano occurred the prior evening when he learned about the videotape.

The court asked the prosecutor to clarify when he received the videotape. The prosecutor replied: "I just received it . . . . I had seen it mentioned in the 2001 police report, but all efforts to locate it to my understanding were unsuccessful" by the prior prosecutor who handled the case, and they presumed the videotape was destroyed once the 2001 case was complete. The prosecutor stated Serrano contacted him the previous evening and said that he kept a personal copy of the videotape of the 2001 undercover operation.

The court admitted the videotape of the 2001 undercover operation despite the belated discovery of the evidence because the prosecutor advised defense counsel of the videotape's existence "when the prosecutor became aware of its existence." The court found the prosecution did not violate discovery, and the videotape was highly probative because it corroborated Serrano's testimony.

The prosecutor said it was difficult to understand any words on the audio portion, and offered to turn on the sound for the jurors to decide. Defense counsel argued the videotape could not be admitted unless the audio portion was transcribed, and the court could not avoid that rule by turning off the sound. The court acknowledged that audio transcripts must be disclosed within 14 days prior to trial, but it decided not to play the audio portion for the jury "because it cannot even be deciphered … and so it would be anybody's guess what is actually being said on that video."

Defense counsel also argued the belated discovery and admission of the videotape violated his due process rights under *Brady*. Counsel thought Serrano's Spanish words could be deciphered through a careful examination of the tape. Counsel argued the conversation between Serrano and defendant might be exculpatory, and requested a continuance of two or three days to examine the tape and determine if the conversation was relevant.

The prosecutor objected to a continuance and argued defense counsel could cross-examine Officer Serrano about the conversation on the videotape using Serrano's police

report about the 2001 incident, which stated that Serrano asked defendant in Spanish for a "rock" and defendant gave him a rock of cocaine.

The court agreed that something was said on the videotape, "but it's not a very long sentence, if it's a sentence at all," and the court denied defense counsel's motion for a continuance.

> "The Court does not see anything that is possibly exonerating in that tape, nor could imagine what a very short sentence would be that would be exonerating given the fact that something is said and then a person hands an item to the speaker I think makes it pretty clear what was said. So that request is denied."

The court decided that the videotape would not be sent into the jury room during deliberations, but it would be played for the jury upon request.

During trial, Serrano testified that MADNET kept the original videotape of the August 2001 undercover operation as evidence, but he did not know what happened to it. Serrano testified that later in 2001, he had to testify before a grand jury about the undercover purchases, and the district attorney's office permitted him to make a copy of the videotape so he could review it before he testified. Serrano testified he kept that copy of the videotape, it remained in his personal possession, and he did not give it to the prosecutor until the morning of his trial testimony.

B. Analysis

Defendant argues the belated discovery of the tape violated his constitutional rights under *Brady* and the statutory reciprocal discovery provisions of section 1054.1.[5] "In *Brady*, the United States Supreme Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

[5] The Attorney General contends that while defendant raised a *Brady* objection before the trial court, he has not renewed that challenge on appeal. (RB 20-21) On appeal, however, defendant points out that defense counsel preserved a *Brady* objection below, and contends the court's admission of the videotape violated his constitutional rights, so we will address the possible application of *Brady* to this case.

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' [Citation.] The high court has extended the prosecutor's duty to encompass the disclosure of material evidence, even if the defense made no request concerning the evidence. [Citation.] The duty encompasses impeachment evidence as well as exculpatory evidence. [Citation.] Such evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' 'A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' [Citation.] '"[T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond may have had on the preparation or presentation of the defendant's case."' [Citations.] Defendant has the burden of showing materiality. [Citation.]" (*People v. Hoyos* (2007) 41 Cal.4th 872, 917-918.) The materiality of the omitted evidence "must be evaluated in the context of the entire record." (*United States v. Agurs* (1976) 427 U.S. 97, 112; *In re Brown* (1998) 17 Cal.4th 873, 887.)

The constitutional duty of disclosure required by *Brady* "is independent of, and to be differentiated from, the statutory duty of the prosecution to disclose information to the defense. [Citations.] The California statutory scheme, adopted by initiative in 1990, requires that the prosecution disclose specified information to the defense," including, among other matters, any exculpatory evidence, and relevant evidence obtained as part of the investigation of the charged offenses. (§ 1054.1, subds. (c) & (e); *People v. Bohannon* (2000) 82 Cal.App.4th 798, 804-805, disapproved on other grounds in *People v. Zambrano* (2007) 41 Cal.4th 1082, 1135, fn. 13 [*Zambrano* overruled on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22].) Absent good cause, such evidence must be disclosed at least 30 days prior to trial, or immediately if discovered or obtained within 30 days of trial. (§ 1054.7.) "'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (*Ibid*.)

The trial court may enforce the reciprocal discovery statute by ordering immediate disclosure of the evidence, contempt proceedings, continuance of the matter, and delaying or prohibiting a witness's testimony or the presentation of real evidence. (§ 1054.5, subds. (b) & (c); *People v. Jordan* (2003) 108 Cal.App.4th 349, 358.) The prosecutor's violation of the reciprocal discovery statute requires reversal "only where it is reasonably probable, by state-law standards, that the omission affected the trial result." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1135, fn. 13.)

"A prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the prosecutor—or the prosecution team—knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Citation.]" (*People v. Superior Court* (*Barrett*) 80 Cal.App.4th 1305, 1314-1315.) "But the prosecution cannot reasonably be held responsible for evidence in the possession of *all* governmental agencies, including those not involved in the investigation or prosecution of the case. 'Conversely, a prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant *unless the prosecution team actually or constructively possesses that evidence or information*. Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material.' [Citation.]" (*In re Steele* (2004) 32 Cal.4th 682, 697, first italics in original, second italics added.) "Similarly, the [California] reciprocal discovery statute refers only to evidence possessed by the prosecutor's office and 'the investigating agencies.' [Citation.] There is no reason to assume the quoted statutory phrase assigns the prosecutor a broader duty to discover and disclose evidence in the hands of other agencies than do *Brady* and its progeny." (*People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1133-1134.)

The prosecution in this case did not violate *Brady* or the reciprocal discovery statute because there is no evidence the prosecution had actual or constructive possession of the

videotape, or knew of its existence, prior to the day before Serrano's trial testimony. The prosecutor knew the undercover purchase had been videotaped based on the 2001 police report but believed the videotape no longer existed, and there is no evidence to dispute this fact. Once Serrano told the prosecutor that he kept a personal copy of the videotape, the prosecutor immediately informed the court and defense counsel about the circumstances surrounding the belated discovery of the tape.

Defendant argues the prosecution had constructive possession of the videotape because it was in Officer Serrano's actual possession and Serrano was part of the prosecution's investigative team in this case. This argument is refuted by the unique facts of this case. While both the charged offense and the 2001 incident were based on investigations conducted by MADNET officers, it is undisputed that the prosecutor determined MADNET no longer had the videotape of the 2001 undercover operation and the tape was likely destroyed. There is no evidence that Officer Serrano was involved in the investigation leading to defendant's arrest in the present case. It is also undisputed that Officer Serrano kept his own personal copy of the videotape after the conclusion of the investigative, grand jury, and prosecutorial proceedings for the 2001 case, and the prosecutor did not learn about the existence of that copy until the night before Serrano's scheduled trial testimony. Serrano was a scheduled prosecution witness in this case only to testify about the 2001 prior conviction. The unique circumstances of Serrano's personal retention of the copy refute defendant's claim that the prosecution actually or constructively possessed that particular videotape.

Defendant contends he did not have the opportunity to watch the videotape before it was played for the jury. This argument is again refuted by the record. The prosecutor advised the court that he had learned about the videotape's existence on the evening before Serrano's scheduled trial testimony, and he offered to play it for defense counsel that morning but defense counsel declined the offer. The trial court ordered the prosecutor to

play the videotape for defense counsel, the court and the parties watched it, and then the court heard the parties' arguments about whether the videotape should be admitted.

In any event, the videotape of defendant's sale of cocaine to an undercover officer did not constitute exculpatory or material evidence in the context of the entire record within the meaning of *Brady* or section 1054.1. There was nothing on the videotape that was remotely favorable to defendant. Instead, it completely corroborated Officer Serrano's testimony about defendant's conduct—that defendant ran up to the van with several other people and tried to sell drugs to Serrano during his first drive into the park, and defendant again ran to the van on Serrano's second trip and sold cocaine to him. It is not reasonably probable that the result of the proceedings would have been different if the existence of the videotape had been disclosed earlier to defendant. The prosecutor's belated discovery of the videotape did not have an adverse effect on defendant's preparation of the case since the trial court had already decided to admit the testimony of Serrano and LaFontaine about the undercover operation, defendant's sale of cocaine to Serrano, and his subsequent conviction for the sale of cocaine.

Defendant asserts the court should have granted a continuance as a sanction for the prosecutor's violation of the reciprocal discovery statute so defense counsel could have examined the videotape and audio portion for possible exculpatory evidence. Defendant argues the court's refusal to grant the continuance violated his constitutional rights to present a defense and confront and cross-examine witnesses because he did not have sufficient time "to prepare his response to this very damaging evidence."

"The granting or denial of a motion for a continuance in the midst of a trial traditionally rests within the sound discretion of the trial judge who must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. In the lack of a showing of an abuse of discretion or of prejudice to the defendant, a denial of his

motion for a continuance cannot result in a reversal of a judgment of conviction. [Citations.]" (*People v. Laursen* (1972) 8 Cal.3d 192, 204; *People v. Zapien* (1993) 4 Cal.4th 929, 972.)

The trial court did not abuse its discretion in denying defendant's request for a continuance and defendant did not suffer any prejudice. As we have already explained, defendant was well aware that Serrano was going to testify to his eyewitness account of how defendant ran to the undercover van on two occasions trying to sell drugs, that Serrano bought cocaine from defendant during his second trip into the park, and defendant was convicted of selling cocaine based on the 2001 incident. The videotape simply corroborated Serrano's testimony and did not raise a new claim by the prosecution that defendant had to meet. While defense counsel asserted he needed time to review the audio portion of the videotape because it might contain exculpatory evidence, such an assertion was purely speculative and refuted by the circumstances of the undercover operation. The videotape depicted defendant as he ran up to the van on two separate occasions and offered to sell drugs to Serrano, and he was finally successful on his second attempt. Defense counsel had the police report from the 2001 incident, which stated that Serrano asked defendant for a rock in Spanish, and Serrano was available for cross-examination as to the exact nature of his extremely brief exchange with defendant. The court's denial of defendant's continuance motion did not deprive defendant of a fair trial.

II. Admission of the videotape

Defendant next contends the court should have excluded the videotape pursuant to Evidence Code section 352 because it was cumulative to the other admissible evidence that defendant sold cocaine to Serrano during the 2001 undercover operation, and it was highly prejudicial since it depicted defendant engaged in the sale of cocaine.

A. Background

As we have discussed, the court granted the prosecution's motion to introduce evidence about defendant's sale of cocaine base to Officer Serrano during the August 2001

undercover operation. The court agreed with the prosecutor's argument that the 2001 incident was relevant and probative pursuant to Evidence Code section 1101, subdivision (b), to prove defendant's intent to sell narcotics in this case, and that he knew of the narcotic nature of the rocks in the plastic bag which fell out of his pants. The court acknowledged there was some evidence of defendant's intent to sell in this case, based on the number of rocks in the plastic bag and absence of drug paraphernalia, but found the 2001 incident was more probative than prejudicial because "a prior sale of the exact same substance five years earlier is relevant on the issue of whether he intended in 2006 to possess that quantity of cocaine base for sale."

The court also held defendant's prior conviction for selling cocaine, based on the same 2001 incident, was admissible and probative to prove that the prior sale of cocaine base actually occurred during that incident. The court and the parties agreed to have a stipulation read to the jury that defendant was convicted of the sale of cocaine based on the 2001 incident.

Also as discussed *ante*, the court overruled defendant's objections and permitted the prosecution to introduce the videotape of defendant's sale of cocaine to Serrano during the undercover operation. After the court addressed the issues regarding the belated discovery of the videotape, it found the videotape was otherwise admissible, probative, and not unduly prejudicial.

> "[The videotape is] only a couple of minutes long and it's only being offered to corroborate Officer Serrano's testimony. It's my understanding Officer Serrano is going to testify that the defendant sold to him. [¶] … So it's corroborating evidence, which means the probative value being that it would dispel any conclusion that Officer Serrano was lying when he said it was [defendant] who sold narcotics to him because the jury would be able to see that on the video that it was [defendant]. So it is highly probative and the Court does not find a discovery violation, so it will be allowed."

B. Analysis

Evidence that a defendant has committed crimes other than those currently charged is not admissible to show bad character or predisposition to criminality, but it may be admitted to prove some material fact at issue, such as motive, opportunity, intent, preparation, common plan or scheme, knowledge, identity, absence of mistake or accident. (Evid. Code, § 1101, subd. (b); *Ewoldt, supra,* 7 Cal.4th at p. 393; *Gray*, *supra*, 37 Cal.4th at p. 202.) The least degree of similarity to the charged crimes is required when evidence of the prior crimes is offered to prove intent. (*Ewoldt*, *supra*, 7 Cal.4th at pp. 402-403.) The trial court's determination of admissibility under Evidence Code section 1101, subdivision (b) is reviewed for abuse of discretion. (*Gray, supra,* 37 Cal.4th at p. 202.)

"Even if evidence of [other] crimes is relevant under [Evidence Code] section 1101, subdivision (b), before admitting the evidence a trial court must also find it has substantial probative value that is not largely outweighed by its potential for undue prejudice under [Evidence Code] section 352. [Citations.] A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great. [Citation.] 'Undue prejudice' refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.'"' [Citations.]" (*People v. Walker* (2006) 139 Cal.App.4th 782, 806.) We review a trial court's decision to admit or exclude evidence under Evidence Code section 352 for abuse of discretion. (*Gray, supra,* 37 Cal.4th at p. 204.)

The court properly admitted evidence of defendant's sale of cocaine to Serrano during the 2001 undercover operation because it was relevant and probative to the disputed issues in this case: whether defendant knew the narcotic nature of the rocks in the plastic

bag which fell out of his pants, and that he possessed 3.79 grams of cocaine with the intent to sell the drugs. Defendant asserts that while the videotape also may have been admissible to prove intent and knowledge under Evidence Code section 1101, subdivision (b), the court should have excluded it as prejudicial since it was cumulative to the testimony of Serrano and LaFontaine about the 2001 undercover operation and to the parties' stipulation that defendant was convicted of the sale of cocaine based on the 2001 incident. Defendant correctly notes that "[i]n many cases the prejudicial effect of [prior crimes] evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute. [Citation.]" (*Ewoldt, supra,* 7 Cal.4th at pp. 405-406.)

However, defendant's knowledge and intent in this case *were* reasonably subject to dispute since defendant sought to undermine the prosecution's evidence that he possessed the bag of cocaine, and that he did so with the intent to sell the drugs. The defense called Curtis Price, defendant's cousin, who testified that the plastic bag of drugs was already on the bedroom floor when the officers arrived at the house to serve the search warrant. The defense also called Ronnie Lewis, who testified that a chronic addict could consume 3.79 grams of rock cocaine in a matter of hours. The videotape of defendant's prior sale of cocaine was highly probative because it depicted defendant's relative sophistication as he tried to outrun the other drug dealers to Serrano's van so he could sell drugs to him, in a location where drugs were openly being sold. The nature and circumstances under which defendant possessed the cocaine in this case were the critical disputed issues, and the videotape was not prejudicial under Evidence Code section 352 because it corroborated Serrano's testimony about defendant's prior narcotics activities. (See, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 894.)

In addition, the court instructed the jury that evidence about defendant's sale of cocaine to Serrano in 2001 was admitted for the limited purpose "of deciding whether or not the defendant acted with the intent to sell cocaine base in this case or the defendant

knew of the substance's nature or character as a controlled substance when he allegedly acted in this case. Do not consider this evidence for any other purpose except for the limited purpose of determining whether the defendant possessed the required specific intent and/or requisite knowledge. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit a crime." We presume the jury followed this limiting instruction. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

III. Imposition of fines.

Defendant asserts the court improperly imposed a fine under section 672, and that statute was not applicable to his convictions in this case. The Attorney General declares that one or more of the fines in this case may have been unauthorized, but requests remand of this case for the trial court to exercise its discretion and reimpose the correct fines.

A. Section 672

Defendant's arguments about the trial court's imposition of an unauthorized fine in this case requires a brief review of the applicable statutes. Section 672 states:

> "Upon a conviction for any crime punishable by imprisonment in any jail or prison, *in relation to which no fine is herein prescribed*, the court may impose a fine on the offender not exceeding one thousand dollars ($1,000) in cases of misdemeanors or ten thousand dollars ($10,000) in cases of felonies, in addition to the imprisonment prescribed." (Italics added.)

In *People v. Breazell* (2002) 104 Cal.App.4th 298, the defendant was convicted of possession for sale, and the trial court expressly imposed a fine pursuant to Health and Safety Code section 11372, and another fine pursuant to section 672. (*Breazell,* at p. 302.) This court held the section 672 fine was not authorized under the circumstances:

> "The language used in section 672 demonstrates that it was meant to provide a fine for offenses *for which another statute did not impose a fine.* In other words, this is a catchall provision allowing a fine to be imposed for every crime, even if the statute criminalizing the conduct did not specifically authorize a fine. *The limiting provision was meant to ensure that a fine pursuant to section 672 would not be imposed if another statute authorized a fine for the offense.*" (*Breazell,* at p. 304, italics added.)

In the instant case, defendant was convicted of felony possession of cocaine base for sale in violation of Health and Safety Code section 11351.5. As applicable to that conviction, Health and Safety Code section 11372 states:

> "In addition to the term of imprisonment provided by law for persons convicted of violating [Health and Safety Code] Section . . . . 11351.5 . . . , *the trial court may impose a fine* not exceeding twenty thousand dollars ($20,000) for each offense. In no event shall a fine be levied in lieu of or in substitution for the term of imprisonment provided by law for any of these offenses." (Italics added)

Thus, based on defendant's conviction for possession for sale in this case, the court had the discretion to impose a fine under Health and Safety Code section 11372. As a result of this statutory authority, the court could not impose the "catchall" fine under section 672 since "another statute authorized a fine for the offense." (*Breazell, supra*, 104 Cal.App.4th at p. 304.)

Defendant's assignment of error is based on the trial court's imposition of a section 672 fine. The probation report in this case recommended a $740 fine pursuant to section 672, along with a $180 laboratory analysis fee pursuant to Health and Safety Code section 11372.5, and a $360 drug program fee pursuant to Health and Safety Code section 11372.7, subdivision (a), all of which included detailed penalty assessments and surcharges. At the sentencing hearing, the court followed the probation report and imposed the following fines:

> "Pay a fine of $740 under Penal Code section 672, a lab analysis fee of $180 under Health and Safety Code section 11372.5, a drug program fee of $360 under Health and Safety Code section 11372.7, subdivision (a). Those amounts include penalties, assessments and surcharges as listed on Page 5 and Page 6 of the [probation] report . . ."

On appeal, defendant contends that under *Breazell*, the court improperly imposed the $740 fine pursuant to section 672, since such a fine can only be imposed when no other statutory fine is assessed, and he was subject to a statutorily authorized fine under Health and Safety Code section 11372.5, based on his conviction of possession for sale.

In her brief, the deputy attorney general agreed the court improperly relied upon section 672 when it imposed the $740 fine, that a section 672 fine is only authorized when no other fine can be imposed based upon the defendant's specific conviction, and that defendant in this case was subject to a fine under Health and Safety Code section 11372 for his conviction of possession for sale. The deputy attorney general argued that since the court imposed an unauthorized sentence when it order the section 672 fine, the matter must be remanded for the court to correct the statutory basis for the $740 fine, because "it is clear" the trial court "intended to impose" that same amount as a fine under Health and Safety Code section 11372. At oral argument, the deputy attorney general modified her position and asserted the actual amount of the fine was not unauthorized, but the court merely relied on the wrong statute, and defendant's failure to object to the error waives review of this issue.

Contrary to the Attorney General's argument, however, the court clearly intended to impose the $740 fine under section 672 since it simply followed the probation report's recommendation and read that provision at the sentencing hearing. The court never expressly or impliedly mentioned Health and Safety Code section 11372 when it imposed the fines in this case. Moreover, the court imposed a statutorily authorized fine based upon defendant's conviction for possession for sale, when it ordered him to pay the laboratory analysis fee under Health and Safety Code section 11372.5, such that it lacked authority to impose the section 672 "catchall" fine. (See, e.g., *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332; cf. *People v. Vega* (2005) 130 Cal.App.4th 183, 194-195.) The section 672 fine of $740 must be stricken and the matter need not be remanded.

B. <u>The laboratory analysis fee</u>

Defendant joins the Attorney General's belief in noting that Health and Safety Code section 11372.5 mandates a criminal laboratory analysis fee of $50, plus various penalty assessments, for each separate conviction for a violation of Health and Safety Code section

11351.5, but the court imposed an excessive fee of $180 in this case and that amount must be reduced.

Health and Safety Code section 11372.5 requires the court to impose a mandatory $50 laboratory analysis fee when the defendant is convicted of certain qualifying offenses, including possession for sale (Health & Saf. Code, § 11351.5). The mandatory laboratory analysis fee is a "fine," and additional penalties or assessments must be imposed under California law upon every fine, penalty or forfeiture imposed and collected by the courts for criminal offenses. (*People v. Sierra* (1995) 37 Cal.App.4th 1690, 1694; *People v. Sanchez, supra,* 64 Cal.App.4th 1329, 1332; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1257.)

Thus, when a trial court imposes the mandatory $50 laboratory analysis fee, it must also impose a $50 penalty assessment pursuant to section 1464, and a $35 penalty assessment pursuant to Government Code section 76000. (*People v. Turner* (2002) 96 Cal.App.4th 1409, 1413-1414, 1417; *People v. Terrell, supra,* 69 Cal.App.4th at p. 1257; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456.) The court must also impose a 20 percent state surcharge of $10 (§ 1465.7) and a state court construction penalty fee of "five dollars . . . for every ten dollars" upon every fine or penalty imposed (Gov. Code, § 70372, subd. (a)). (*People v. Taylor, supra,* 118 Cal.App.4th at pp. 457-458.) Finally, the court must impose "an additional penalty of one dollar for every ten dollars" already imposed, pursuant to the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (Gov. Code, § 76104.6) and "one dollar … for every ten dollars" already imposed in county penalties (Gov. Code, § 76104.7).

As we have explained, the court in this case followed the probation report's recommendations when it imposed the fines and fees. The probation report recommended:

> "$180 Lab Analysis Fee per 11372.5 H&S, *includes a $50 Base Fee,* a $50 State Penalty Assessment per 1464 PC, a $10 State Penalty Assessment per 76104.6/.7 GC, a $35 County Penalty Assessment per 76000 GC, a $25

> State Court Facilities Construction Fund Penalty per 70372(a) GC, and a $10 surcharge per 1465.7 PC." (Italics added.)

At the sentencing hearing, the court imposed "a lab analysis fee of $180 under Health and Safety Code section 11372.5," but specifically stated the fee included "penalties, assessments and surcharges" as detailed in the probation report. Moreover, the minute order and abstract of judgment contain the same detailed list of the $50 base fine, along with the penalties and surcharges as contained in the probation report. (Cf. *People v. High* (2004) 119 Cal.App.4th 1192, 1200 ["All fines and fees must be set forth in the abstract of judgment"].) The entirety of the record thus clarifies the court imposed the correct amount of $50 as the mandatory laboratory analysis "base" fee, and the additional amounts reflected the correct calculation of the various penalty assessments and surcharges.

C. <u>The drug program fee</u>

The parties further note that Health and Safety Code section 11372.7 authorizes a drug program fee not to exceed $150 for each separate qualifying offense, plus various penalty assessments. Defendant joins the Attorney General's belief that the court imposed a statutorily excessive drug program fee of $360 in this case.

As with the laboratory analysis fee, the drug program fee imposed under Health and Safety Code section 11372.7 is a "fine" that is subject to the same additional assessments, surcharge, and penalties. (*People v. Sierra*, *supra*, 37 Cal.App.4th at pp. 1694-1696; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530; *People v. Terrell*, *supra*, 69 Cal.App.4th at pp. 1256-1257.) The probation report in this case recommended:

> "$360 Drug Program Fee, per 11372.7(a) H&S, *which includes a $100 Base Fine*, a $100 State Penalty Assessment per 1464 PC, a $20 State Penalty Assessment per 76104.6/.7 GC, a $70 County Penalty Assessment per 76000 GC, a $50 State Court Facilities Construction Fund Penalty per 70372(a) GC, and a $20 surcharge per 1465.7 PC." (Italics added.)

At the sentencing hearing, the court imposed "a drug program fee of $360 under Health and Safety Code section 11372.7, subdivision (a)," and again stated that amount included the penalties, assessments, and surcharges as detailed in the probation report. The

minute order and abstract of judgment again contain a detailed list of the $100 "base" drug program fine and the attached penalties and assessments. The entirety of the record thus reflects the court properly imposed $100 as the "base" drug program fee, well within the statutory maximum, and the additional amounts were the appropriate penalties and surcharges.

DISPOSITION

The $740 fine and accompanying penalty assessments and surcharges imposed pursuant to Penal Code section 672 are stricken. The trial court is directed to correct the abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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POOCHIGIAN, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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KANE, J.